Supreme Court, U. S.
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No. 76-1061

In the Supreme Court of the United States

OCTOBER TERM, 1976

SANG YON SHIN, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that this Court should exercise its power of supervision to correct an alleged abuse of discretion by the court of appeals and the Board of Immigration Appeals in denying petitioners' applications for adjustment of status under 8 U.S.C. 1255(a).

Petitioners are both Korean nationals who entered this country on nonimmigrant transit visas while purportedly enroute to permanent settlement in Brazil. Both overstayed their visas. Separate deportation proceedings were instituted at which each petitioner applied for an adjustment of status to permanent resident; in each case the immigration judge denied the application but accorded the petitioner the privilege of voluntary departure. The Board of Immigration Appeals dismissed their separate appeals and affirmed the voluntary departure orders of

the immigration judge (Pet. Apps. G, N). In each case, the court of appeals affirmed (Pet. Apps. A, I).

1. The particular facts in regard to petitioner Shin are set forth in the opinion of the Board of Immigration Appeals (Pet. App. G). Shin entered the United States claiming to be in transit to Brazil and testified at the hearing before the immigration judge that he had been preparing to emigrate to Brazil for a significant period of time prior to his departure from Korea. But Shin did not appear to be very knowledgeable with respect to Brazilian politics, geography or economics. Moreover, he arrived in this country in possession of $30,000 in United States currency, rented an apartment shortly after his arrival and arranged to purchase property less than two months after entry. Although he indicated on his transit visa application that he had never before applied for a United States visa, in fact he had previously attempted unsuccessfully to obtain a business visitor's visa. On these facts, the immigration judge concluded and the Board of Immigration Appeals concurred that Shin had entered the United States with a preconceived intent to remain. Since Shin had attempted to circumvent the visa-issuing process and no significant favorable factors were present in this case, the Board held that the denial of the adjustment of status was a proper exercise of discretion by the immigration judge (Pet. App. G).

In regard to petitioner Choi, the record shows that he rented a furnished apartment and opened a bank account approximately ten to twelve days prior to the time that he was due, under his visa, to leave this country for Brazil (R. 41-42). His explanation at the hearing before the immigration judge about why he did not depart as scheduled was that relatives here who had taken

him sightseeing had asked him to see a "few more things" (R. 38) and that he forgot the date (R. 45). On these facts the Board of Immigration Appeals concluded that Choi had a preconceived intent to remain in this country and that an exercise of discretion in his favor was not warranted; the Board therefore held that the immigration judge had reached a correct result in denying Choi an adjustment of status (Pet. App. N 35).

2. Petitioners concede they are deportable (see Pet. App. A 1; Pet. App. I 21), but contend that it was error to deny them an adjustment of status under 8 U.S.C. 1255(a). Such relief, however, is discretionary with the Attorney General, and here the court of appeals correctly affirmed the exercise of that discretion. As the court of appeals stated in *Choi*, using language that is applicable to petitioner Shin's case as well (Pet. App. I 21):

> The Board of Immigration Appeals (BIA) specifically found that the petitioner entered the United States on a transit visa with a preconceived intent to remain permanently. Such a finding justifies denial of an application for adjustment of status. *Soo Yuen* v. *INS*, 456 F. 2d 1107 (9th Cir. 1972); *Santos* v. *INS*, 375 F. 2d 262 (9th Cir. 1967). The question of adjustment of status is completely discretionary with the INS * * * .

It was well within the Board's discretion to deny an adjustment of status on the facts before it.

Petitioners suggest, however, that the finding that each petitioner had attempted to circumvent the visa-issuing process is inconsistent with the Board's decision to grant them the privilege of voluntary departure. But that suggestion has no bearing upon the Board's discretionary decision to deny petitioners an adjustment of status. Permitting voluntary departure and granting an adjustment

of status are separate and distinct forms of discretionary relief, and one may be granted while the other is denied.[1] Voluntary departure is advantageous to the United States as well as to the alien since it ordinarily saves the United States the time and expense of deportation. As the court of appeals noted (see Pet. App. A 2), the Immigration and Naturalization Service should therefore have "wide latitude" in determining whether voluntary departure should be permitted.[2] Such a determination should not control whether the alien also should receive an adjustment of status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1977.

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[1]If permitting voluntary departure were inconsistent with denying an adjustment of status, the proper conclusion is not, as petitioners contend, that the denial of an adjustment of status was an abuse of discretion but rather, as the court of appeals noted (Pet. App. I 22), that voluntary departure may have been erroneously permitted. Since permission to depart voluntarily is favorable to petitioners, they understandably did not challenge such permission in this case.

[2]Contrary to petitioners (Pet. 7), there is no inconsistency between the holdings of the court of appeals in these cases and its prior holding in *Trias-Hernandez* v. *Immigration and Naturalization Service*, 528 F. 2d 366, 370. *Trias-Hernandez* held merely that it is not an abuse of discretion to *deny* voluntary departure when no evidence of good moral character is presented.